NO. 80-1018

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The Appellees assert in their "Motion to Dismiss or in the Alternative to Affirm" that there is no substantial federal question involved in this case. Yet the Supreme Courts of the States of Illinois, Wisconsin, Minnesota and Nebraska have each held their respective states' dormant mineral legislation to be unconstitutional. *Wilson v. Bishop*, (Ill. 1980) 412 N.E.2d 522; *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W. 2d 316; *Contos v. Herbst*, (Minn. 1979) 278 N.W.2d 732; *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768. The Supreme Courts of Indiana - - in the present case - - and Michigan have held their respective dormant mineral legislation to be constitutional. *Short v. Texaco, Inc.*, (1980) ____ Ind. ____, 406 N.E.2d 625; *Van Slooten v. Larsen*, (Michigan Supreme Court Docket No. 62256, decided December 23, 1980). All six of these cases have been decided within the last three and one half years, with three of the decisions rendered within the last six months. The large number of states which have enacted this type of legislation, the litigation which this body of legislation has generated, and the division among the Supreme Courts of the various states on the constitutionality of such legislation all indicate the substantial importance of the questions raised by this appeal. Until this Court addresses the issue of what constitutional guidelines and parameters are applicable to this type of legislation, the legitimacy and constitutionality of this type of legislation will continue to be litigated, thereby hampering the effectiveness of such legislation and impairing future legislative efforts in this area.

The Appellees' argument that the Indiana Dormant Mineral Act satisfies strong policy objectives does not address the constitutional objections mised in the Appellants' Jurisdictional Statement. Not only must dormant mineral legislation have a valid police power objective, it must also satisfy the constitutional dictates of the due process clause, the contract clause, and the equal protection clause of the U. S. Constitu-

tion. No matter how laudable the end, the means to that end must be constitutional. The primary question presented by this body of legislation is not whether it has valid policy objectives, but whether it conforms to the requirements of the Constitution in its efforts to obtain these policy objectives. For the reasons set forth in the Jurisdictional Statement filed herein, the Indiana Dormant Mineral Act does not conform to the dictates of the United States Constitution in its efforts to achieve these policy objectives.

Appellees argue that dormant mineral legislation is similar to marketable title acts, statutes of limitation, and recording acts, and speculate that if this Court declares dormant mineral legislation unconstitutional, it will also have to declare unconstitutional these other types of legislation. The Supreme Courts of Illinois and Minnesota had no difficulty distinguishing between statutes of limitation and dormant mineral acts. *Wilson v. Bishop*, (Ill. 1980) 412 N.E.2d 522, 526; *Contos v. Herbst*, (Minn. 1979) 278 N.W.2d 732, 745. In addition, the Supreme Court of Minnesota in *Contos v. Herbst, supra*, p. 744, found no analogy between dormant mineral legislation and marketable title legislation. This is particularly enlightening in view of the fact that the Minnesota Supreme Court previously upheld the Minnesota Marketable Title Act in the case of *Wickelman v. Messner*, (1957) 250 Minn. 88, 83 N.W.2d 800, which is considered one of the leading cases in the country on the question of the constitutionality of marketable title legislation.

Furthermore, the Supreme Courts of Illinois and Nebraska, which had previously upheld the constitutionality of statutes terminating possibilities of reverter [*Hiddleston v. Nebraska Jewish Education Society*, (1971) 186 Neb. 786, 186 N.W.2d 904; *Trustee of Schools v. Batdorf*, (1955) 6 Ill.2d 486, 130 N.E.2d 111], subsequently held their respective states' dormant mineral legislation to be unconstitutional. *Wilson v. Bishop, supra; Wheelock v. Heath, supra.*

There are substantial reasons why the Supreme Courts of Illinois, Minnesota, Wisconsin and Nebraska found no analogy between dormant mineral legislation and remedial legislation - - statutes of limitation, marketable title acts, and

recording legislation. Statutes of limitation are in aid of the record title owner, and not in derogation of the rights of the record owner. Statutes of limitation, recording acts and marketable title acts are remedial, protecting the owner of record of an estate in land against stale, spurious or doubtful claims arising prior to the commencement of the statutory period or against unknown or hidden claims. Such acts apply separately to the respective mineral and surface estates, protecting the owners of each. Statutes of limitation and marketable title acts are in aid of the record title owner, whether of the surface or mineral estate or the entire fee. Dormant mineral legislation is in derogation of the rights of the record owner. Dormant mineral acts purport to void the effect of a conveyance which would itself constitute an effective root of title to the mineral estate under a marketable title act. Not only is there no analogy between dormant mineral acts and remedial type acts, there is a direct and inescapable conflict as to the purpose, principal and rationale of the two. These remedial acts are meant to aid the record title owner and assist in removing clouds upon that title. Dormant mineral legislation is meant to take the valid and unchallenged ownership of a real property interest from the rightful owner thereof. It does not remove clouds on the title to property, but actually creates an adverse claim and a cloud on that title.

The only constitutional question which the Appellees address in their Motion to Dismiss or Affirm is whether the Indiana Dormant Mineral Act conforms to procedural due process requirements. They do not discuss the three other constitutional objections to the Act raised in the Appellants' Jurisdictional Statement: 1) that the Act constitutes an impairment of contract in violation of the contract clause of the U. S. Constitution, Article I, Section 10; 2) that it violates the equal protection clause of the 14th Amendment of the U. S. Constitution by creating an arbitrary classification; and 3) that it violates the due process clause, Section 1 of the 14th Amendment of the U. S. Constitution, by taking private property without compensation.

The Appellees argue in their Motion to Dismiss or Affirm

that the Indiana Dormant Mineral Act does not violate procedural due process requirements of the 14th Amendment because it is a self-executing statute. This argument evades the questions before the Court in this case. The fact that the Indiana Dormant Mineral Act is self-executing does not shield the Act from due process scrutiny. On the contrary, the fact that it is self-executing - - not providing notice and a hearing to the owner of the mineral interest at some meaningful time - - makes the Act more constitutionally defective. This Court has steadfastly required that notice and a hearing be provided at some meaningful time whenever a property interest is taken. While this Court has held that it is not always necessary to have a hearing prior to the taking of a property interest, there must at least be a hearing immediately following the taking of the property interest. *Mackey v. Montrym*, (1979) 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321, *Barry v. Barchi*, (1979) 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365. Since the owner of the mineral interest is not required to be given notice of the taking and is not provided with a judicial hearing to challenge the facts surrounding that taking, the possibility of error is substantial. This possibility of error is further increased by the fact that the person who makes a determination of whether or not there has been a use made of the mineral interest - - which would preserve the interest pursuant to the Act - - is the reversionary interest claimant, the very person who would most directly gain by the lapse of the mineral interest. This can hardly be considered a fair, just and impartial determination of the facts in compliance with procedural due process.

The Court should note probable jurisdiction of this appeal.